Bristol Farms, Inc. *and* United Food and Commercial Workers International Union, Local 1442, AFL–CIO. Case 31–CA–18839

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 20, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Finding that the Respondent possessed a sufficient property right in its front sidewalk area to exclude the Union's picketers and handbillers, the judge concluded that their exclusion did not violate Section 8(a)(1) of the Act. We do not agree.

The Respondent's gourmet grocery store, one of two anchor stores in Manhattan Marketplace, a strip shopping center in Manhattan Beach, California, opened in January 1991.[1] The Respondent leases the store building from Mission-CCH1, which owns and operates the shopping center. The store is separated from the street by a substantial parking lot.

On April 4, union agents who were not employees of the Respondent began peacefully handbilling and picketing in the covered sidewalk area outside the store's doors. They wore sandwich boards bearing the following message: ''Please! Do not shop at this nonunion Bristol Farms Store. The employees at this store are not covered by a collective bargaining agreement.'' The union agents also passed out handbills asking customers not to shop at the store and directing them to other listed ''union stores'' in the area. Normally two individuals at a time took part in the handbilling and picketing.

The Respondent, at least at times, used the sidewalk area outside its doors for the display and sale of a changing array of merchandise, such as pizza, hot dogs, plants, or pumpkins.[2] The record shows that the union agents who handbilled or picketed in the sidewalk area did not interfere with the Respondent's conduct of its business or any person's ingress to or egress from the Respondent's store.[3]

On April 29, the Respondent and Mission-CCH1 amended the Respondent's lease to add a new paragraph providing, inter alia:

> Tenant has the exclusive right to use the area in front of Tenant's store up to the edge of the curb for the sale of merchandise from the sidewalk area in front of Tenant's store building; provided, however, that Tenant's sale of merchandise from the sidewalk area will not unreasonably interfere with vehicular and/or pedestrian traffic in the Shopping Center.

Subsequent to amendment of the lease, the Respondent on May 10 excluded the Union's agents from the doorway entrance under threat of arrest.[4]

In dismissing the complaint, the judge rejected the General Counsel's argument that the Respondent did not possess a sufficient property interest in the sidewalk in front of its store to exclude trespassers. Rather, the judge found that, under the lease, the Respondent's property rights in the sidewalk area rose to the level of exclusory rights as contemplated under Board precedent. He summarily rejected the General Counsel's contention that under California law even the fee simple owner of a shopping center store and adjacent sidewalk lacks a property right to exclude handbillers and picketers from the sidewalk in front of the store. Finally, the judge found that the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), which issued after the hearing closed in this case, precludes the finding of a violation under a *Jean Country*[5] balancing of interests theory.

In considering the issues raised by this case, we bear in mind the following general principles. It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act.[6]

[1] All dates are in 1991, unless otherwise noted.

[2] The parties disputed whether the Respondent was displaying or selling merchandise on the sidewalk during the period that the Union engaged in handbilling and picketing there. The judge did not resolve this issue, and we find it unnecessary to do so. For purposes of analysis, we shall assume that the Respondent, as it contended, was using the sidewalk area for display and sale of merchandise during the period of the Union's handbilling and picketing.

[3] This conclusion is supported by the affirmative testimony of two witnesses. Although the Respondent's general manager testified summarily that the Respondent received complaints from customers that they were interfered with and harassed by handbillers or picketers, the Respondent failed to present any evidence of the particulars of any individual complaint or any witness to any incident of interference or harassment.

[4] The General Counsel does not allege that, in securing this amendment to the lease, the Respondent was prompted by antiunion considerations.

[5] 291 NLRB 11 (1988).

[6] Indeed, in *Lechmere*, although the Supreme Court, reversing the Board, recently held that an employer lawfully barred union organizers from a shopping center parking lot owned by the employer, the Court did not grant certiorari to consider the Board's holding, affirmed by the court of appeals, *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 325 (1st Cir. 1990), that the same employer violated the Act by attempting to expel the organizers from public property adjoining

Continued

See, e.g., *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). Further, an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities.[7] See *Polly Drummond Thriftway*, 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 351 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

On the other hand, when nonemployee union representatives engaging in Section 7 activity are excluded from private property by an employer possessing a property right that (aside from any Sec. 7 privilege the union representatives might have to remain on the property) entitles the employer to exclude them, there is a conflict between the union's Section 7 rights and the employer's property right. In such circumstances, due to the conflict between these two rights, a more complex analysis is required to determine if the employer's exclusion of the union representatives violates the Act. The contours of this type of conflict have been addressed by the Supreme Court in a series of decisions from *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), to *Lechmere*, above.

In cases arising under the Act, although employers' property rights must be given appropriate respect, an employer need not be accorded any greater property interest than it actually possesses. Thus, the analysis that applies when Section 7 rights and property rights conflict is not appropriately invoked as to an employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individuals. *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

In the present case, the initial question is whether the Respondent possessed a property right that, without considering any possible Section 7 privilege that the union agents may have had, entitled the Respondent to exclude them from the sidewalk area in front of its store. If it did, the Respondent's conduct must be examined under the case law applied when there are conflicting Section 7 and property rights. If it did not, however, this case presents no conflict between Section 7 rights and property rights, and the case law concerning such conflicting rights is not implicated.[8] See *Johnson & Hardin Co.*, above.

To determine whether the Respondent had a property right entitling it to exclude the union agents from the sidewalk in front of its store, we must look to the law that created and defined the Respondent's property interest. It is well-established that property rights generally are created by state, rather than Federal, law. As the Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

The Court reiterated a similar notion in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980):

> Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define ''property'' in the first instance.

Even *Babcock & Wilcox*, the seminal case in the Court's delineation of the limits of an employer's right to exclude union organizers from the employer's private property, touched on the origin of the private property rights in question. The Court stated:

> Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. [351 U.S. at 112.]

In stating that the National Government ''preserves'' property rights while ''grant[ing]'' organization rights, the Court indicated implicitly that the property rights it was protecting were not granted by the Federal Government.[9]

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the shopping center. On remand, the Board reaffirmed its finding of this particular unfair labor practice. *Lechmere, Inc.*, 308 NLRB 1074 (1992).

[7] This precept is not altered by the Supreme Court's decision in *Lechmere*. The employer there owned the shopping center parking lot from which it excluded the union organizers and it possessed a sufficient property interest to exclude individuals from the parking lot.

[8] There is no contention that the union agents' picketing and handbilling was not protected activity. We find it clearly protected under the second proviso to Sec. 8(b)(7)(C), which concerns picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization. The right of union representatives to engage in this type of activity is well established. See *D'Alessandro's, Inc.*, 292 NLRB 81 (1988) (union agents' 8(b)(7)(C) proviso picketing and handbilling is concerted activity within ''mutual aid or protection'' language of Sec. 7); see generally *Longshoremen ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 202 (1970) (White, J., concurring) (picketing by nonemployees protesting substandard wage conditions protected by Sec. 7); *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 281–282 (1960) (recognitional picketing protected by the Act except where specifically prohibited); *Garner v. Teamsters Local 776*, 346 U.S. 485, 499–500 (1953) (state court injunction of nonemployees' organizational picketing found improper; freedom of unions to engage in picketing except where specifically prohibited by the Act found to serve the public interest).

[9] That the National Government ''preserves'' property rights presumably was a reference to the fifth amendment's prohibition on the

To determine the nature and extent of the Respondent's property interest in the sidewalk in front of its store, we must, therefore, look to the law of the State of California, the State where the Respondent's store is located. See *Johnson & Hardin Co*., above (state law examined to determine employer's property right). California law both grants and defines the extent of the property rights of shopping center owners and their tenant stores. Under California law, neither a shopping center nor its individual tenant-retailers have a right to prohibit individuals from handbilling or picketing on the shopping center premises, including in front of individual stores in the shopping center, even though the shopping center is privately owned. In *Robins v. Pruneyard Shopping Center*, 153 Cal.Rptr. 854, 592 P.2d 341 (Cal. 1979), affd. 447 U.S. 74 (1980), the California Supreme Court found that a shopping center did not have a right to expel from its premises high school students soliciting signatures for a petition opposing a United Nations resolution, although the court found that the shopping center could adopt reasonable time, place, and manner rules concerning such activity. The court concluded that the shopping center's property right was limited by the free speech and petition sections of the California constitution, which encompassed the students' activity. In so holding, the court relied, inter alia, on prior California Supreme Court decisions finding that a shopping center lacked the right to enjoin as trespass a union's picketing on the privately owned sidewalk in front of a bakery within the shopping center, *Schwartz-Torrance Investment Corp. v. Bakery Workers Local 31*, 40 Cal.Rptr. 233, 394 P.2d 921 (Cal. 1964), and that a local trespass ordinance could not prohibit a union officer from distributing handbills on a privately owned sidewalk outside a doorway to a supermarket, *In re Lane*, 79 Cal.Rptr. 729, 457 P.2d 561 (Cal. 1969).

The U.S. Supreme Court, affirming the California Supreme Court's *Pruneyard* decision, upheld California's right to restrict the property rights of shopping centers to a greater extent than that required by the Federal Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Subsequently, California courts have found the California Supreme Court's *Pruneyard* decision to apply to a union's distribution of handbills in a shopping center, *Northern California Newspaper Organizing Committee v. Solano Associates*, 239 Cal.Rptr. 227 (Cal.App. 1 Dist. 1987), and to encompass exercises of free speech and petition at shopping centers other than the solicitation of signatures, *Westside Sane/Freeze v. Ernest W. Hahn, Inc*., 274 Cal.Rptr. 51 (Cal.App. 2 Dist. 1990).

deprivation of property without due process and the taking of private property for public use without just compensation.

Consequently, it appears that under California law the Respondent did not have a right to exclude the union agents from the sidewalk in front of its grocery store and would not have possessed such a right even if it had possessed complete ownership of that sidewalk. Thus, the union agents' engaging in Section 7 activities on that sidewalk did not interfere with any property right of the Respondent.[10] The law concerning conflicts between Section 7 rights and property rights is, therefore, not applicable to this case. Rather, under the settled precedent discussed above, we find that the Respondent's exclusion of the union agents, who were engaged in Section 7 activity, from the sidewalk in front of its store on May 10, 1991, violated Section 8(a)(1) of the Act.[11] See *Johnson & Hardin Co*., above; *Giant Food Stores*, 295 NLRB 330 (1989), motion for reconsideration denied 298 NLRB 410 (1990); *Polly Drummond Thriftway*, above; *Barkus Bakery*, above.[12]

CONCLUSION OF LAW

By prohibiting representatives of United Food and Commercial Workers Union, Local 1442, AFL–CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of the Respondent's store in the Manhattan Marketplace shopping center, Manhattan Beach, California, and threatening such representatives with arrest if they did not cease engaging in such activity, the Respondent has violated Section 8(a)(1) of the Act.

[10] We note there is no evidence that the Respondent had adopted any reasonable time, place, or manner rules concerning picketing or handbilling on the sidewalk in front of its store, assuming arguendo it had an adequate property interest to do so. In any event, we have found that the Union's picketing and handbilling did not interfere with the Respondent's conduct of its business or ingress to and egress from its store.

[11] In light of this conclusion, we find it unnecessary to pass on the judge's analysis of the Respondent's lease or his conclusion that the Supreme Court's decision in *Lechmere* precludes the finding of a violation under a *Jean Country* balancing of interests theory.

[12] In view of the heavy burden unions must generally shoulder of showing lack of reasonable alternative means of communication in order to justify trespassory area standards activity, Member Oviatt is troubled by a result that forces any employer to grant access to property it owns or leases without requiring an alternative-means showing by the union seeking access for this purpose. See his dissent in *Oakland Mall*, 304 NLRB 832 (1991). Nonetheless, the issue here is one of state law, and the U.S. Supreme Court has conclusively established in *Pruneyard* that a state may interpret its constitution to authorize more expansive rights of free speech than those conferred under the first amendment, and specifically has approved California's conferral of these rights on those seeking access to a privately owned shopping mall. Consequently, Member Oviatt is constrained to find under California law that the Respondent cannot rely on its leasehold interest to eject the union agents from its sidewalk.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Bristol Farms, Inc., Manhattan Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of United Food and Commercial Workers Union, Local 1442, AFL–CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of the Respondent's store in the Manhattan Marketplace shopping center, Manhattan Beach, California, and threatening such representatives with arrest if they do not cease engaging in such activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with the Respondent's store.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its store at the Manhattan Marketplace shopping center copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of United Food and Commercial Workers Union, Local 1442, AFL–CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of our store in the Manhattan Marketplace shopping center, Manhattan Beach, California, and threaten such representatives with arrest if they do not cease engaging in such activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with our store.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BRISTOL FARMS, INC.

Ann Reid Cronin, Esq., for the General Counsel.
David Adelstein, Esq. (Schwartz, Steinsapir, Dorhmann & Sommers), of Los Angeles, California, for the Charging Party.
Steven M. Steese, Esq., of Gardena, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on November 19, 1991, in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 31 of the National Labor Relations Board (the Board) on June 25, 1991, based on a charge filed on May 14, 1991, and docketed as Case 31–CA–18839 by the United Food and Commercial Workers International Union, Local 1442 (the Charging Party or the Union) against Bristol Farms, Inc. (Respondent). Posthearing briefs were received on January 21, 1992.

The complaint alleges that Respondent's agents excluded union agents from the sidewalk at the entrance to Respondent's Manhattan Beach store in violation of Section 8(a)(l) of the National Labor Relations Act (the Act). Respondent denies that its conduct violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California corporation with an office and place of business in Manhattan Beach, California, where it has been engaged in the retail grocery business. Respondent as part of its business operations annually enjoys revenues in excess of $500,000 and annually purchases and receives goods or services from outside the State of California of a value in excess of $50,000. Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates grocery stores in Southern California including a new facility (the store) in the newly constructed Manhattan Marketplace shopping center (the shopping center) on Rosecrans Avenue in Manhattan Beach, California. At all relevant times the store's employees have not been represented by a labor organization.

The Union represents employees in the retail trade in the geographical area in which the store is located. Among those represented employees are employees of employers who are competitors of the store.

B. *The Store*

1. The physical layout

The store is one of two anchor tenants in the Manhattan Marketplace, a new strip mall shopping center which was not as yet fully occupied at the time of the events at issue herein. The shopping center is located on Rosecrans Avenue in Manhattan Beach, California, and is accessible from a main shopping center entrance and a second entrance to the west. The store and a drugstore, the two main or anchor stores in the shopping center, as well as a few smaller stores are in a row parallel to but well set back from Rosecrans and separated from it by a substantial parking lot. These stores all face toward Rosecrans and are fronted by a sidewalk or promenade. A separate, smaller strip of stores abuts the sidewalk at Rosecrans and proceeds directly away from the street toward the setback store strip at right angles to it.

The store building is essentially rectangular with an enclosed area of about 25,000 square feet. The roof of the structure overhangs the front sidewalk area providing a covered area Respondent utilizes for the display and sale of merchandise. The building has a main door which, while located on the front wall of the structure, is well under the portico.

2. Respondent's interest in the property

The shopping center has at all times material been owned and operated by Mission-CCH1, a California state limited partnership (the Landlord). Respondent and the Landlord entered into a lease agreement on September 25, 1989, and amended the lease on January 5, 1990, and April 29, 1991. The agreement (the Original Lease), which refers to Respondent as ''Tenant,'' sets forth the premises covered at numbered section F by referencing exhibit A. The identifying marks placed on exhibit A make it clear that Respondent's leased property is the building itself and does not extent to the surrounding areas. The lease provides in section 5 for a ''Common Area'' which is defined in paragraph 5.1 Definition:

> The ''Common Area'' is that area within the Shopping Center which is neither occupied by building (excluding roof overhangs and canopies, columns supporting roof overhangs and canopies and subsurface foundations) nor devoted permanently to the exclusive use of a particular tenant . . . .

Section 5.2 of the lease provides that the Landlord shall keep the original construction of common area improvements in a neat and level condition. Sections 5.4 and 5.6 provide for allocation of costs of operation and maintenance of the common area among tenants. Section 5.3 of the lease provides for nonexclusive use of the common areas by the Landlord, tenants, subtenants, customers, invitees etc. Section 5.7 gives the Landlord ''general possession and control over the entire Common Area . . .''

The Third Amended Lease entered into on April 29, 1991, made a single change. It inserted a new paragraph, paragraph 5.l0:

> 5.10 Sidewalk: It is agreed that Tenant has the exclusive right to use the area in front of Tenant's store up to the edge of the curb for the sale of merchandise from the sidewalk area in front of Tenant's store building; provided, however, that Tenant's sale of merchandise from the sidewalk area will not unreasonably interfere with vehicular and/or pedestrian traffic in the Shopping Center. Tenant shall, at its sole cost and expense, maintain the area in a neat and clean condition and repair any damage to the sidewalk area caused by periodic or seasonal sales and Tenant's obligations shall not be considered a Common Area expense.

3. Events

The store opened for business in January 1991. On or about April 4, 1991, agents of the Union located themselves at the outside of the store's door but under the structure's outside roofed area. This placed them well within the area used by Respondent to display merchandise offered for sale. They initially wore sandwich boards bearing the message:

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

PLEASE!
DO NOT SHOP
AT THIS
NON-UNION
Bristol Farms
STORE.
THE EMPLOYEES AT THIS
STORE ARE NOT COVERED
BY A COLLECTIVE
BARGAINING AGREEMENT

The union agents also passed out handbills asking customers not to shop at the store and directing customers to other ''Union Stores'' listed by name and address in the area.

Respondent's employees at all relevant times have not been represented by a labor organization, nor did the Union at any time demand recognition from Respondent concerning its store employees. The handbilling continued at the doorway entrance until May 10, 1991, on which date Respondent's agents excluded them from the area under threat of arrest. The handbilling stopped until late July at which time it resumed until early September 1991.

4. Analysis and conclusions

The Board has repeatedly addressed the situation where property holders act to exclude employees and or union agents from their property. The Board's cases have identified the property interests and the rights under the Act in conflict and determined in given situations whether or not the former rights allowed exclusion of the latter from the property.

The instant case at trial seemed to again present the balancing process putting the property interests of Respondent and the rights of the Union into the scales. This seemingly conventional litigation was overtaken by events and the evolving law discussed infra. The change in the law and its implications for the instant case are discussed initially below. Thereafter the remaining case of the General Counsel is addressed.

a. *The Supreme Court's January 27, 1992 decision in Lechmere Inc. v. NLRB*

This case was tried and briefed with the Board's lead case of *Jean Country,* 291 NLRB 11 (1988) (*Jean Country*), in the minds of all parties. The record closed on November 7, 1991, and posthearing briefs were submitted on January 21, 1992. Less than 1 week later, on January 27, 1992, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB,* 112 S.Ct 841 (1992), 139 LRRM 2225 (1992) (*Lechmere*), rejecting substantial portions of the Board's *Jean Country* analysis.

Counsel for Respondent submitted the Court's decision to me after the filing of briefs. The General Counsel has not readdressed the case since its earlier submitted brief.[2]

Assuming the General Counsel's *Jean Country* theory of a violation is still before me for consideration, I find the Board's decision has been rejected by the Court in *Lechmere*, supra. It follows therefore that the General Counsel's balancing of interests theory herein is without merit.

b. *The General Counsel's attack on Respondent's property rights herein*

The General Counsel also argues that only Respondent and not the Landlord excluded the Union's agents and that Respondent at no relevant time possessed sufficient property rights in the sidewalk areas at issue herein to exclude union handbillers irrespective of the nature and extent of the handbiller's rights under the Act. This argument is independent of the balancing tests struck down by *Lechmere* and remains for consideration.

(1) The legal argument

The General Counsel argues that the instant case is controlled by the Board's recent decision in *Johnson & Hardin Co.*, 305 NLRB 690 (1991). In that case the Board found that an employer had improperly excluded union handbillers from the driveway leading to its plant. The Board found the driveway was on land owned by the State of Ohio and that

> the Respondent did not possess an interest in this property sufficient to exclude from it trespassers, such as the organizers here, who were not interfering with the Respondent's right to use the driveway for ingress and egress. [Footnote omitted.] [305 NLRB 690, supra].

The Board in *Johnson & Hardin* specifically held that its *Jean Country* balancing test does not come into play in such a situation simply because there is an insufficient property interest on the part of the employer to exclude individuals from the property even if their presence is not protected by Section 7 of the Act. Ibid.

In *Giant Food Stores,*, 295 NLRB 330 (1989), a case also relied on by the General Counsel, the Board found the employer leasing land in a shopping center did not have ''any exclusory property interest in the sidewalk in front of the [employer's] store or in the shopping center parking areas'' because the lease gave the employer ''merely the 'non-exclusive' right to 'use' such common areas'' and the landlord was obligated to maintain common areas and keep them free of obstructions (295 NLRB, supra, at 332). See also *Polly Drummond Thriftway*, 292 NLRB 331 (1989).

The General Counsel further argues that the State of California recognizes a free speech right of access to common areas of shopping centers citing *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 910; 153 Cal.Rptr. 854, 869, 592 P.2d 341 (1979), affd. 447 U.S. 74 (1980). Counsel for the General Counsel notes that in *In re Lane*, 71 Cal.2d 872, 79 Cal. Rptr. 729, 733, 457 P.2d 561 (Cal.1969), the California Supreme Court upheld the right of a labor union to handbill on a privately owned sidewalk in front of a grocery store. From these cases the Government argues on brief at 10:

> While employers in other jurisdictions may be able to claim a strong property interest in these areas, Respondent cannot do so, inasmuch as, under the law of this State, it has no property interest or right to [] exclude free speech and petitioning activities in front of its Manhattan Marketplace store.

[2] In a related case involving similar issues and conduct at the same shopping center, see JD(SF) 69–92 issued by me this date, the General Counsel's brief was submitted 2 days after *Lechmere* and the *Jean Country* balancing theory of a violation was withdrawn.

Respondent notes that it has regularly utilized its outside areas for merchandise sales and display. Counsel on brief notes that the lease defines ''Common Areas'' as areas not devoted to the exclusive use of a particular tenant. He further points out that well before Respondent acted to exclude the handbillers, it had obtained under the Third Amended Lease the exclusive use of this area.

The General Counsel answered Respondent's arguments respecting its sales of merchandise on brief at 10–11:

> Respondent's decision to display merchandise on the sidewalk in front of its store should have little effect on the free-speech guarantee recognized by California courts. California courts have repeatedly recognized the right to handbill in the common area of shopping centers. These shopping centers frequently have a mixed use: they provide walkways for customers between stores and on occasion they are used to display merchandise. In these circumstances, Respondent cannot immunize itself from handbilling and public criticism by displaying merchandise on the sidewalk.

(2) Analysis and conclusion

The parties were aware of and briefed the proposition asserted in *Jean Country*, supra at 13 fn. 7, respecting employer expulsion cases:

> Of course, there is an initial burden on the party claiming the property right to show, through testimonial or documentary evidence, that it has an interest in the property and what its interest in the property is. A party has no right to object on the basis of other persons' property interests, and an employer's mere objections to having union pickets outside its establishment does not in itself rise to the level of a property interest. See *Barkus Bakery*, 282 NLRB 351 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987). There the Board found it unlawful for the respondent employer to eject union organizers from privately owned property which abutted the employer's plant but which was under the control of another establishment that was not shown to object to the organizers' presence. 282 NLRB 351, at fn. 2.

I find that this minimum property interest principle was not diminished by the Supreme Court's *Lechmere* decision. Indeed it seems axiomatic that a property interest must be demonstrated whenever the right to exclude or prohibit activity in particular areas is asserted. Only those who have a sufficient interest in property, an exclusory interest, may properly remove or seek the removal of union handbillers.

The General Counsel correctly notes that, as in *Barkus Bakery*, 282 NLRB 351 (1986), the fee holder herein, the Landlord, has not been shown to have ''joined Respondent'' in excluding the Union's agents from the property at issue. Respondent's conduct must therefore be justified by its own independent property rights. It is therefore appropriate to immediately turn to Respondent's property interests herein.

The applicable lease provisions have been quoted supra. Respondent under the terms of the Third Amended Lease has the ''exclusive right'' to sell merchandise subject only to the provision that such activities should not unreasonably interfere with either vehicular or pedestrian traffic in the shopping center. Respondent's actual use of the area at relevant times is consistent with the rights granted under the lease.

While the leasehold rights possessed by Respondent are not exclusive without limit, they are significantly greater than simple nonexclusive rights held in common with other tenants and the Landlord. I find such property rights, on the record presented here, rise to the level of exclusory rights as contemplated in *Jean Country*, footnote 7 quoted in full supra. The General Counsel's cited cases: *Johnson & Hardin Co*., supra; *Giant Food Stores*, supra; and *Polly Drummond Thriftway* supra, are not to the contrary. In each of those cases the property rights found wanting were less significant. Thus in *Johnson & Hardin* the property right involved was a simple easement of ingress and egress; in *Polly Drummond Thriftway* and *Giant Food Stores*, only rights to common use were held with maintenance and upkeep obligations held by the landlord. In *Barkus Bakery* supra, the property interest was essentially fictitious.

I find that Respondent's property rights under the Third Amended Lease[3] are sufficient to meet the burden in footnote 7 in *Jean Country* quoted in full supra. I further find therefore that the General Counsel has not prevailed under this theory of a violation. Accordingly, I find that Respondent did not violate the Act by excluding union handbillers.[4] The General Counsel's complaint is therefore without merit and will be dismissed.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record herein, I make the following Conclusions of Law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(1) of the Act as alleged in the complaint.

[Recommended Order omitted from publication.]

[3] The General Counsel did not attack the circumstances under which the amended lease was negotiated and signed nor argue that the rights created by the amendment were somehow lessened thereby.

[4] I do not find that the California property rights cases cited by the General Counsel command a different result.